No. 04-1704

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION, *et al.*,
Petitioners,

v.

CHARLOTTE CUNO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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December 1, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of Petitioners, DaimlerChrysler Corporation, *et al.*[1] Tax Executives Institute, Inc. ("TEI" or "the Institute") is a voluntary, non-profit association of corpo-

[1] Pursuant to Rule 37.6, *amicus* Tax Executives Institute states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Petitioners have filed consents to the filing of *amicus* briefs in support of either party with the Court. TEI has received the written consent of Respondents and has filed it with the Court.

rate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 under the laws of the State of New York and is exempt from taxation under section 501(c)(6) of the Internal Revenue Code (26 U.S.C.). TEI has approximately 5,700 members who represent more than 2,800 of the leading corporations in the United States, Canada, Europe, and Asia. Institute members represent a cross-section of the business community whose employers are, almost without exception, engaged in interstate commerce. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws, reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and vindicating the Commerce Clause and other constitutional rights of all business taxpayers.

Today, TEI has nearly 600 members within the 4 states of the Sixth Circuit, and a majority of the Institute's other members work for companies whose activities (measured, for example, by property, payroll, or sales) extend into the Sixth Circuit. Moreover, many of these companies have availed themselves of the tax incentives at issue here (or to similarly structured incentives offered by other States). Because this case implicates the constitutionality of virtually every state and local tax incentive and, regardless of its disposition, may markedly affect all U.S. state and local tax systems, it is of interest to all TEI members.

By striking down Ohio's investment tax credit, the U.S. Court of Appeals for the Sixth Circuit upset the settled expectations of companies investing in new plants and equipment in Ohio in reliance on the tax credit. It also deprived Ohio (and similarly situated States) of an important and time-honored mechanism for encouraging job-creating investments. More fundamentally, the court's decision raises key issues under the Commerce Clause about the States'

freedom to compete for interstate commerce and foster economic development within their borders, as well as important issues of who may challenge a State's tax policy choices. As individuals who contend daily with the interpretation and administration of tax laws nationwide, the Institute's members—and their employers—have a vital interest in the proper disposition of this case.

SUMMARY OF ARGUMENT

1. To foster economic growth and development, Ohio enacted an investment tax credit for businesses that install new manufacturing machinery and equipment in the State. DaimlerChrysler qualified for and claimed the credit following expansion of its vehicle-assembly plant in Toledo. DaimlerChrysler's entitlement to this credit was challenged by Ohio and Michigan citizens (collectively "Cuno") asserting the credit violates the Commerce Clause of the U.S. Constitution.

2. This case involves two questions: (a) Does Cuno have standing to bring this action? and (b) Does Ohio's tax credit discriminate against interstate commerce in violation of the Commerce Clause? As to the first question, *amicus* TEI submits that Respondents do not. As to the second question, *amicus* TEI submits that Ohio's tax credit does not discriminate against interstate commerce and the decision below misapprehends this Court's Commerce Clause jurisprudence.

3. The standing requirement emanates from Article III, § 2 of the Constitution, which limits the federal courts' jurisdiction to "cases" or "controversies."[2] It asks simply whether "a party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."[3] For a party to have standing, three elements must be satisfied: (1) the party must have suffered an injury

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[2] *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997).

[3] *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972).

in fact, (2) the injury must be fairly traceable to the actions of the defendant, and (3) the injury must be redressable by a favorable decision.[4]

4. To satisfy the standing requirement, the Ohio and Michigan citizens here must show that they have suffered some actual or threatened injury as a result of the unlawful conduct of the State of Ohio in granting tax incentives to DaimlerChrysler and other manufacturers.[5] The injury must be distinct and palpable, not merely abstract, conjectural, or hypothetical. Conjectural or hypothetical possibility of injury —injury that is not "actual or imminent"—is insufficient.[6]

5. Even assuming Cuno is correct in averring that the investment tax credit "depletes the funds of the State of Ohio . . . thereby diminishing the total funds available for lawful uses" (an allegation at odds with the legislature's determination), the matter is one for the legislative or executive branch to address, not the courts. Indeed, there is no real injury alleged, and the challengers' generalized grievance is only an effort—disdainful of the separation-of-powers doctrine—to "vindicate their value preferences through the judicial process."[7]

6. More problematic than the ethereal nature of the challengers' alleged injury is that the declaratory and injunctive relief sought would do absolutely nothing to redress their supposed injury. Thus, the third element of standing evanesces, and Cuno's lack of standing is apparent.

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[4] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

[5] *Valley Forge Christian Coll. v. Americans for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

[6] *Lujan*, 504 U.S. at 564.

[7] *Sierra Club*, 405 U.S. at 740.

7. During the past three decades, this Court has invoked the Commerce Clause to invalidate state taxing schemes that unreasonably burdened interstate commerce by discriminating against out-of-state taxpayers.

8. In *Boston Stock Exchange v. State Tax Comm'n*,[8] this Court held a New York transfer tax that more heavily taxed stock transfers if they occurred outside the state to violate the Commerce Clause. Seven years after *Boston Stock Exchange*, the Court explained in *Westinghouse Electric Corp. v. Tully*,[9] that it made no difference that a transfer tax was not involved, or that a tax credit was at issue. The franchise tax scheme in that case was constitutionally flawed because the State imposed a greater tax burden on receipts from out-of-state DISC sales. *Bacchus Imports Ltd. v. Dias*,[10] decided the same year, dealt with a tax exemption from the Hawaii liquor excise tax for certain locally produced alcoholic beverages that did not facially discriminate against out-of-state distributors, but that violated the Commerce Clause by according reciprocal benefits to Hawaii's local liquor industry. More recently, in *New Energy Co. of Indiana v. Limbach*,[11] the Court struck down an ethanol tax credit applied against Ohio's motor vehicle fuel sales tax for fuel produced in the State, explaining that reciprocity will not remediate otherwise facial discrimination.

9. Against the backdrop of these cases, the Sixth Circuit was called upon to assess whether Ohio's manufacturing investment tax credit crossed the line. Regrettably, the Court of Appeals misapprehended the Court's jurisprudence and improperly invalidated Ohio's investment credit. Specifically, not every difference in treatment constitutes discrimination.

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[8] 429 U.S. 318 (1977).

[9] 466 U.S. 388 (1984).

[10] 468 U.S. 263 (1984).

[11] 486 U.S. 269 (1988).

10. Four distinguishing characteristics of Ohio's investment tax credit at issue here render it constitutional: (a) Ohio is not discriminating against products manufactured or business operations performed in any other State, (b) the investment tax credit is not related to discrete transactions and it does not target a particular product or industry, (c) the amount of the credit does not change relative to activities in other states, and (d) Ohio's statute does not discriminate on its face but rather is freely available to any corporation engaging in the prescribed activities in Ohio.

12. Although this Court has invalidated state tax incentives, in each case it also affirmed the ability of the States to foster economic growth within their borders.[12] The Court observed that the "delicate adjustment" between the national interest in free trade protected by the Commerce Clause and the legitimate interest of States in exercising their power to tax turns on "the unique characteristics of the statute at issue and the particular circumstances in each case."[13] Thus, the distinguishing characteristics of the tax credit at issue are highly significant.

13. Despite the uninterrupted guidance from this Court that the States are not powerless to create incentives to local activities, the Court of Appeals muddled Commerce Clause jurisprudence, potentially leaving every state tax incentive vulnerable to challenge. While the limitations imposed by the Commerce Clause are real, they do not vitiate the power reserved to the States in our federal system. Where a state tax statute (a) is closely tailored to advance a specific, legitimate state interest, (b) does not discriminate on its face, and (c) does not directly burden out-of-state interests, it should be sustained.

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[12] *Boston Stock Exchange*, 429 U.S. at 336; *Westinghouse*, 466 U.S. at 407 n.12; *Bacchus*, 468 U.S. at 271; *New Energy*, 486 U.S. at 278.

[13] *Boston Stock Exchange*, 429 U.S. at 329.

14. Investment tax credits, along with an array of other tax incentives, are widely used by States to encourage growth in economically distressed areas, spur investment, increase jobs, and hence, enlarge the tax base. Left intact, the Court of Appeals' determination will deprive States the ability to manage their economies and deny taxpayers the certainty they rightly need to plan and conduct their business affairs.

15. Should the result in this case remain unchanged, the existing boundaries within which States have worked for years to promote economic growth through tax incentives will be blurred and the settled expectations of the States and taxpayers will be upended.

ARGUMENT

In 1997, Ohio enacted a tax credit to spur in-state capital investment.[14] Any company, whether or not already present in Ohio, could qualify for a 7.5-percent credit against its Ohio franchise tax liability by increasing its investment in manufacturing in the State. Further, capital investment occurring within specifically designated areas was eligible for an enhanced credit of 13.5 percent, thereby allowing the State to target economically depressed areas.

In 1998, DaimlerChrysler added a manufacturing facility to its existing plant in Toledo that satisfied the requirements for the enhanced investment tax credit. In addition, DaimlerChrysler negotiated a 10-year real property tax exemption with the City of Toledo.

In 2000, several Ohio and Michigan citizens (collectively, "Cuno") brought suit in the Lucas County, Ohio, Common Pleas Court, for declaratory and injunctive relief contending that Ohio's investment tax credit and the property tax exemption were unconstitutional. Specifically, Cuno argued

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[14] Ohio Rev. Code § 5733.33.

that the preferential treatment accorded in-state investment under Ohio law, as well as the property tax exemption granted by Toledo, discriminated against interstate commerce in violation of the Commerce Clause of the U.S. Constitution.[15] The case was removed to the U.S. District Court for the Northern District of Ohio, which dismissed the suit on a motion for failure to state a claim. On appeal, the Court of Appeals reversed, holding that the investment tax credit violated the Commerce Clause. At the same time, the Court found that Ohio's property tax incentive did not violate the Commerce Clause.[16]

This Court granted DaimlerChrysler's petition for a writ of certiorari (as well as the companion petition by Ohio and the city of Toledo), which framed the issue as whether Ohio's investment tax credit violates the Commerce Clause.[17] In doing so, the Court asked the parties to address whether Cuno has standing to challenge the Ohio statute.

I. CUNO LACKS STANDING TO CHALLENGE OHIO'S INVESTMENT TAX CREDIT

The standing requirement emanates from Article III, § 2 of the Constitution, which limits the federal courts' jurisdiction to "cases" or "controversies."[18] It differs from other issues because it focuses not on the substantive questions to be adjudicated, but rather on the parties to a dispute, asking

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[15] U.S. CONST. art I, § 8, cl. 3.

[16] App. 1a. "App." references are to the various appendices bound with the Petition for a Writ of Certiorari, *DaimlerChrysler Inc.*, et al. *v. Charlotte Cuno*, et al., No. 04-1704 (filed Jun. 17, 2005). The real property tax exemption is the subject of Cuno's Petition for a Writ of Certiorari in *Charlotte Cuno*, et al. *v. DaimlerChrysler Inc.*, et al., No. 04-1407 (filed Apr. 18, 2005).

[17] Cuno's Petition for a Writ of Certiorari is pending with the Court.

[18] *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997).

simply whether "a party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."[19] As Justice O'Connor wrote in *Allen v. Wright*,[20] to have standing "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[21]

For a party to have standing, three elements must be satisfied: (1) the party must have suffered an injury in fact, (2) the injury must be fairly traceable to the actions of the defendant, and (3) the injury must be redressable by a favorable decision.[22] Because Cuno has not suffered any injury in fact, there is no harm for the Court to redress, and thus it follows that Cuno cannot satisfy the second and third standing elements.

To satisfy the standing requirement, the Ohio and Michigan citizens here must show that they have suffered some actual or threatened injury as a result of the unlawful conduct of the State of Ohio in granting tax incentives to Daimler-Chrysler and other manufacturers.[23] The injury must be distinct and palpable, not merely abstract, conjectural, or hypothetical. Thus, if a State's action has barred or otherwise interfered with prospective business activities, the standing requirement is satisfied.[24] If the harm has not already occurred, there must be sufficient threat of actual injury—

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[19] *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972).

[20] 468 U.S. 737 (1984).

[21] *Id.* at 751. *See United States v. Richardson*, 418 U.S. 166, 194 (1974) (Powell, J., concurring) ("a plaintiff must allege some particularized injury that sets him apart from the man on the street.")

[22] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

[23] *Valley Forge Christian Coll. v. Americans for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

[24] *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984).

"concrete in both a qualitative and temporal sense"—to satisfy the injury in fact requirement.[25] Conjectural or hypothetical possibility of injury—injury that is not "actual or imminent"—is insufficient.[26] Hence, this Court has determined that cases raising a generalized grievance would meet the injury-in-fact requirement only where there is a clear showing that the action challenged has caused or will cause an individual injury and that a judicial pronouncement of rights will be likely to redress that injury.[27]

"Generalized grievance" is a generous term for Cuno's supposed injury in this case. The Ohio taxpayers challenged the investment tax credit because the credit "depletes the funds of the State of Ohio . . . thereby diminishing the total funds available for lawful uses." They aver that because Ohio funds are diminished, "disproportionate burdens" are (or will be) imposed on them. Even assuming Cuno is correct in alleging that state revenues would decline (an allegation at odds with the legislature's determination), the matter is one for the legislative or executive branch to address, not the courts. Indeed, there is no real injury alleged, only an effort by the challengers—at odds with the separation of powers doctrine—to "vindicate their value preferences through the judicial process."[28]

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[25] *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990).

[26] *Lujan*, 504 U.S. at 564.

[27] *Sierra Club*, 405 U.S. at 734-35.

[28] *Id.* at 740. Cuno's challenge represents nothing more than a "man on the street" (*see United States v. Richardson*, 418 U.S. at 194) effort to use the courts to address a question of broad public significance—the propriety of state tax incentives. Thus, it runs counter to the Court's declining, on prudential grounds, to find standing in cases involving "abstract questions of broad public significance pervasively shared and most appropriately addressed in the representative branches" of government. *See Valley Forge*, 454 U.S. at 474-75.

So, too, with the Michigan taxpayers, who complain that DaimlerChrysler was induced by Ohio's investment tax credit to expand its existing operation in Toledo, rather than relocate the operation elsewhere, say, in Michigan. They speculate that the jobs and tax revenues generated by Daimler-Chrysler's operation in Ohio would otherwise inure to the benefit of Michigan, thereby reducing their local tax burden. More problematic than the ethereal nature of this alleged injury is their requested relief (an injunction against operation of Ohio's investment tax credit), which would do absolutely nothing to relocate DaimlerChrysler's facility from Toledo to Michigan.[29] That no judicial determination could begin to redress their supposed injury exposes their lack of standing.

II. OHIO'S INVESTMENT TAX CREDIT DOES NOT VIOLATE THE COMMERCE CLAUSE

During the past three decades, this Court has invoked the Commerce Clause to invalidate a number of state taxing schemes that unreasonably burdened interstate commerce by discriminating against out-of-state taxpayers. While the Sixth Circuit was correct to consider those decisions in weighing the constitutionality of the Ohio investment tax credit, the court below erred in ruling the Commerce Clause mandated its decision. Indeed, a careful review of the cases confirms that, while "the scope of the doctrine that bars discriminatory taxes has not been clearly delineated,"[30] the Sixth Circuit distended the applicable precedents in striking down Ohio's investment tax credit.

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[29] One member of Cuno is a small business whose real property was condemned by the city of Toledo using its eminent domain power. This property is now occupied by DaimlerChrysler's expanded facility. The declaratory and injunctive relief sought by Cuno, however, would do nothing to redress this displacement, and thus even this member of Cuno fails to meet the third element of standing.

[30] App. at 5a.

In *Boston Stock Exchange v. State Tax Comm'n*,[31] this Court struck down a New York transfer tax that more heavily taxed stock transfers occurring outside the state. A unanimous court concluded that "because it imposes a greater tax liability on out-of-state sales than on in-state sales, the New York tax . . . falls short of the substantially evenhanded treatment demanded by the Commerce Clause."[32] Holding that "no state may discriminatorily tax the products manufactured or the business operations performed in any other state,"[33] *Boston Stock Exchange* has provided a clarifying lens for reviewing the constitutionality of state taxing schemes.

Seven years after *Boston Stock Exchange*, the Court took up the issue of discriminatory taxation in *Westinghouse Electric Corp. v. Tully*,[34] a case involving a franchise tax credit. Following enactment of a federal tax law granting preferential treatment to export sales by "Domestic International Sales Corporations" (DISCs), New York amended its tax statute to include income from DISC sales in the income of the parent corporation for New York corporate tax purposes. At the same time, New York provided a tax credit that varied depending on whether the DISC sales originated in New York as well as on the relative proportions of the taxpayer's New York and non-New York DISC sales. It was the credit provisions that prompted the Court to strike down the New York scheme as discriminatory. Citing *Boston Stock Exchange*, the Court said that it made no difference that a transfer tax was not involved, or that a tax credit was at issue. The tax scheme was constitutionally flawed because the

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[31] 429 U.S. 318 (1977).

[32] *Id.* at 332.

[33] *Id.* at 337.

[34] 466 U.S. 388 (1984).

manner in which the credit was computed created a greater tax burden on receipts from out-of-state DISC sales.[35]

In 1984, the Court also decided *Bacchus Imports Ltd. v. Dias,*[36] a case involving a tax exemption from the Hawaii liquor excise tax for certain locally produced alcoholic beverages. Although the statute did not facially discriminate against out-of-state distributors, the Court found that the reciprocal benefit afforded to Hawaii's local liquor products and industry violated the Commerce Clause.

Westinghouse and *Bacchus Imports* crystallized the governing principles in this area, affirming the core holding of *Boston Stock Exchange*, and answering some remaining questions. First, the prohibition on discriminatory taxes applies not only to indirect, transaction-based taxes (like the transfer tax in *Boston Stock Exchange*), but also direct taxes, such as income taxes. Second, the bar reaches tax schemes providing a tax benefit (credit or exemption) to in-state businesses or operations, as well as state statutes penalizing out-of-state activity. Finally, tax statutes need not be discriminatory on their face to be inimical to the Commerce Clause.

More recently, the Court addressed the constitutionality of a state tax credit in *New Energy Co. of Indiana v. Limbach.*[37] There, the Court addressed a challenge to an ethanol tax credit against Ohio's motor vehicle fuel sales tax for fuel produced in the State. Although the credit was available in a reciprocal fashion for ethanol produced in other States to the extent such States provide a credit for ethanol produced in Ohio, the Court struck it down on the grounds that the Ohio provision "explicitly deprives certain products of generally available beneficial tax treatment because they are made in

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[35] *Id.* at 400-01.

[36] 468 U.S. 263 (1984).

[37] 486 U.S. 269 (1988).

certain other States, and thus on its face appears to violate the cardinal requirement of nondiscrimination."[38] Thus, *New Energy* clarified that reciprocity will not remediate otherwise facial discrimination.

Against the backdrop of these cases, the Sixth Circuit was called upon to assess whether Ohio's manufacturing investment tax credit crossed the line. While Ohio's investment tax credit was intended to and, in fact, did provide an incentive to taxpayers to invest in the State, *amicus* TEI submits the statute does not run afoul of the neutrality required by the Commerce Clause. Rather, misapprehending the nuances and significance of the Court's jurisprudence, the Court of Appeals erred in invalidating Ohio's investment credit.

TEI submits that distinguishing characteristics of Ohio's investment tax credit enable it to pass constitutional muster. Unlike the circumstances in *Boston Stock Exchange*, Ohio is not discriminating against products manufactured or business operations performed in any other State. Indeed, the credit here does not relate to a transaction tax at all, but rather to the State's franchise tax. The tax credit is also distinguishable from the exemption in *Bacchus* because, first, it is not related to a transactional tax, and second, it does not target a particular product or industry. As for *Westinghouse*, the tax credit is different because the amount does not change relative to activities in other States. In other words, the Ohio investment tax credit encourages increased investment in the State (like the *Westinghouse* credit), but it does not directly penalize additional investment in other States (unlike the *Westinghouse* credit). Indeed, since the credit applied to Ohio's corporate franchise tax, the tax involved only applies

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[38] *Id.* at 274.

to activities in Ohio.[39] Moreover, although the credit in *Westinghouse* was applied against New York's corporate income tax, it was calculated on a transaction-by-transaction basis (*i.e.*, on the basis of DISC sales); here, Ohio's investment tax credit was computed on the basis of the company's investment in plant and equipment. Finally, unlike the statute in *New Energy*, the Ohio tax credit is, again, not transaction based and does not discriminate on its face: It is available to any corporation engaging in the prescribed activities in Ohio, and reciprocity is not an issue.

These distinctions are highly significant given this Court's recognition that States may structure their tax systems "to encourage the growth and development of intrastate commerce and industry" and may "compete with other States for a share of interstate commerce."[40] As the Court observed in *Boston Stock Exchange*, when making the "delicate adjustment" between the national interest in free trade protected by the Commerce Clause and the legitimate interest of States in the exercise of their power to tax, the result turns on "the unique characteristics of the statute at issue and the particular circumstances in each case."[41]

Not every difference in treatment constitutes unconstitutional discrimination. Although this Court invalidated the state tax incentives in *Boston Stock Exchange* and the other cases, each time it also affirmed the ability of the States to foster economic growth within their borders. Thus, the Court declared in *Boston Stock Exchange* that the Commerce Clause "does not prevent the States from structuring their tax systems to encourage the growth and development of intra-

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[39] The credit in *Westinghouse* varied depending on the relative proportion of the taxpayer's New York and non-New York sales. 466 U.S. at 400.

[40] *Boston Stock Exchange*, 429 U.S. at 336-37.

[41] *Id.* at 329.

state commerce and industry."[42] In *Westinghouse*, the Court averred that "[w]e do not hold that a State may not compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy,"[43] and elaborated in *Bacchus* that "[a] State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry."[44] And in *New Energy*, the Court confirmed that the Commerce Clause "does not prohibit *all* state action designed to give its residents an advantage in the marketplace."[45]

This Court's decisions teach that where a state tax statute (a) is closely tailored to advance a specific, legitimate state interest, (b) does not discriminate on its face (*i.e.*, its effect is readily available to all), and (c) does not directly burden out-of-state interests, it should be left intact. Where both in-state and out-of-state companies are eligible to receive investment tax credits, as in the case here, the Commerce Clause should not preclude such incentives. In other words, tax incentives should be sustained so long as they do not penalize out-of-state activity. Because any taxpayer, including non-domiciliary companies such as DaimlerChrysler here, may avail itself of the benefits afforded by the Ohio investment credit, the credit should be sustained. This is the essence of the free-trade and open competition that the Commerce Clause should permit while guarding against predatory and discriminatory state practices.

Despite the uninterrupted guidance from this Court that the States are not powerless to create incentives to local activities, the Court of Appeals fashioned a decision that muddles Commerce Clause jurisprudence and potentially

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[42] *Id.* at 336.

[43] 466 U.S. at 407 n.12.

[44] 468 U.S. at 271.

[45] 486 U.S. at 278 (emphasis added).

leaves every state tax incentive vulnerable to challenge. Indeed, since the Sixth Circuit rightly upheld the property tax exemption that DaimlerChrysler claimed regarding the new plant and equipment, while striking down the investment tax credit, it is difficult to fathom what type of incentives might survive scrutiny.

In summary, while the limitations imposed by the Commerce Clause are real, the Clause does not vitiate the power reserved to the States in our federal system. Nearly all States have some type of tax incentive to encourage in-State economic activity, and more than 30 offer an investment tax credit analogous to Ohio's. In California, for example, placing qualifying property into service after January 1, 1994, yielded a manufacturer's investment credit for many taxpayers.[46] In Illinois, taxpayers may claim a credit in respect of qualifying property placed in service between July 1, 1984, and January 1, 2004.[47] And in New York, an investment tax credit related to qualifying property acquired after December 31, 1968, is available to taxpayers.[48] These are just three examples of investment tax credits; by one recent count, there are more than 330 income or franchise tax incentives.[49] More fundamentally, the Court of Appeals' decision implicates even the most neutral (and basic) tax policy decisions, such as lowering a tax rate or narrowing a tax base compared with other states, as "discriminatory." Accordingly, the Court should reverse the decision below.

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[46] Cal. Rev. & Tax. Cd. § 23649(a)(1). The California credit is not available for property placed in service after January 1, 2004.

[47] Ill. Admin. Code 86 § 100.2101(a).

[48] N.Y. Tax Law § 210(12).

[49] Timothy H. Gillis, *Sixth Circuit Bans Ohio Tax Credit Under the Dormant Commerce Clause, Casting a Pall on Incentives*, 101 J. Tax'n 359, 360 (2005) (citing Mark L. Nachbar, *Credits and Incentives: Alabama Through Hawaii*, 1450 T.M. (BNA) (2005)).

III. THE DECISION BELOW UPENDS SETTLED EXPECTATIONS OF BOTH BUSINESSES AND THE STATES

Investment tax credits, along with an array of other tax incentives, are widely used by states to encourage growth in economically distressed areas, spur investment, increase jobs, and hence, enlarge the tax base. If not reversed, the Court of Appeals' determination will reverberate across the country to the detriment of taxpayers and States alike. States will be denied the ability to manage their economies and taxpayers will be deprived of the certainty they rightly need to plan and conduct their business affairs.

The importance of Ohio's investment tax credit is beyond dispute: In this case alone, it spurred the creation or retention within the State of more than 4,000 jobs and prompted a $1.2 billion expansion by DaimlerChrysler.[50] In 2004, Ohio's Development Director worked with more than 193 companies to expand or locate in Ohio, representing more than 53,000 jobs in Ohio.[51] And Ohio is not just competing with other States: It, like other States, faces increasing competition from Canada, Mexico, and Asia to secure and retain businesses. Ohio, through this credit, is simply pursuing a tax policy strategy to encourage investment within its borders and boost its economy.

Should the result in this case be affirmed, the existing boundaries within which States have worked for years to promote economic growth through tax incentives will be blurred and the settled expectations of the States and taxpayers upended. Not only will taxpayers that have detri-

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[50] The Honorable Bruce Johnson, Lt. Governor & Dir., Ohio Dep't of Dev., Testimony before the Subcommittee on the Constitution of the Committee on the Judiciary, United States House of Representatives (May 24, 2005) (transcript available in *amicus* TEI's offices).

[51] *Id.*

mentally relied on the States' actions be severely disadvantaged, but the attendant uncertainty will discourage further investment by other taxpayers and thus frustrate the States' incentive efforts. The Court should reverse the decision below and in so doing, clarify the Commerce Clause's bar on discriminatory taxation and restore certainty to the area.

CONCLUSION

For the foregoing reasons, the Court should vacate or, in the alternative, reverse the decision below invalidating Ohio's investment tax credit.

Respectfully submitted,

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December 1, 2005